Vitol Asia Pte Ltd v The Owners of the Ship or Vessel 'Malik Al Ashtar' of the Port of Malta (ING Bank NV & Anor, interveners)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO 27NCC-3–02 OF 2015
AZIZAH NAWAWI J
15 JULY 2016

Civil Procedure — Pleadings — Statement of claim — Second intervener supplied bunkers to defendant's vessel — Defendant received notice of lien from plaintiff claiming ownership of bunkers — Plaintiff obtained warrant of arrest of defendant's vessel — Plaintiff applied to amend statement of claim — Whether application bona fide — Whether amendments would not in effect turn suit from one character into suit of another and inconsistent character — Defendant applied to strike out statement of claim — Whether there was agency relationship between second intervener and defendant — Whether there was valid claim premised on conversion — Whether claim for unjust enrichment sustainable — Whether there was any direct contract between plaintiff and defendant

The second intervener ('OWB') had supplied and delivered a quantity of about 2,468.501 metric tonnes of bunkers ('the subject bunkers') to the defendant's vessel ('the vessel') and before the expiry of 30 days credit payment term under OWB supply contract, the defendant received notice of lien stated that the plaintiff was the owner of the subject bunkers. Subsequently, the plaintiff commenced the present action and obtained a warrant of arrest and arrested the vessel at Port Klang. The plaintiff then filed an application vide encl 45 to amend the statement of claim to include cl L4 of the OWB group terms and conditions, which would mean that both the defendant and OWB were bound by the plaintiff's general terms and conditions for the supply of the subject bunkers. The defendant in response filed encl 24 to strike out the plaintiff's writ in rem and statement of claim as amended. Pending the hearing of encl 24, the interveners commenced a separate suit ('the ING Suit') against the defendant whereby in the suit, the defendant's vessel was arrested as a security for the interveners' claim for the purchase price of the subject bunkers. In the ING Suit, the court also granted summary judgment in favour of the interveners for the full purchase price in respect of the subject bunkers. With regards to encl 45, the issues for determination were whether the application was bona fide; and whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. As for encl 24, the issues for consideration were: (a) whether there was an agency relationship between OWB and the defendant; (b) whether there was any valid

claim premised on conversion; (c) whether the claim for unjust enrichment was sustainable; and (d) whether there was any direct contract between the plaintiff and the defendant.

Held, dismissing encl 45 with costs; and allowing encl 24 with costs:

(1) The introduction of the new causes of action represented a substantial shift from that upon which the vessel was initially arrested, based upon completely different factual structures. Thus, encl 45 was not bona fide, as the basis of invoking the admiralty jurisdiction was different from the present claim by the plaintiff. In addition, it was a tactical manoeuvre from the court's earlier decision for summary judgment in the ING Suit. The addition of statements meant to establish a direct contractual relationship between the plaintiff and the defendant and a contractual lien over the subject bunkers. This was clearly not the basis on which the vessel was arrested and was not the basis of the parties' dealings at the material time in October 2014 (see paras 29(f) & 37–38).

(2) Based on the affidavits, there was no evidence that the defendant and OWB had ever agreed by written agreement or by conduct that OWB was contracting on behalf of the defendant when OWB entered into the contract with the plaintiff (see para 47).

(3) In the circumstances, the plaintiff had known and accepted that OWB was not an end user but a trader, that it would contract with the owner of the vessel to which the bunkers would be delivered, and that the contract with the owners would authorise them, expressly or by necessary implication, to consume the bunkers immediately. As such, the defendant was not liable for conversion as the plaintiff had consented to the use of the subject bunkers by the vessel. Further, as the court in the ING Suit had decided that the plaintiff had no title to the subject bunkers, the plaintiff therefore could not claim for conversion. The plaintiff's claim for conversion was therefore legally and factually unsustainable (see para 54).

(4) The plaintiff had supplied the subject bunkers to the vessels pursuant to its contract with OWB and had no contract with the defendant. This means that the plaintiff should only look to OWB for payment under its contractual bargain, not the defendant. Further, if the claim in unjust enrichment was allowed, the net result was that the defendant would effectively be exposed to double liability as the defendant had already been ordered to pay for the price of the same subject bunkers to the interveners in the ING Suit. In the premise, there was no merit in the claim for unjust enrichment (see paras 61–63).

(5) In the present case, there was nothing to show that the defendant had agreed to be bound by the plaintiff's terms when the defendant entered

into a direct contract for supply of the subject bunkers with OWB. Nor did the defendant agree or authorise OWB to be bound by the plaintiff's terms when OWB entered into an agreement with the plaintiff for the supply of the same subject bunkers. Further, the plaintiff was never a party to OWB-defendant contract neither was the defendant a party to the plaintiff-OWB contract. The plaintiff was therefore barred by the doctrine of privity of contract from enforcing or relying upon the provisions of the OWB-defendant contract (see paras 66 & 70).

(6) With regards to contractual lien, since there was no direct contract between the plaintiff and the defendant, a contractual lien did not arise. As for maritime lien, the plaintiff had conceded that there was no maritime lien in rem available to the supplier of bunkers in either English or Malaysian law, as such, the plaintiff was estopped from taking a contrary view (see paras 72 & 74–75).

[Bahasa Malaysia summary

Pecelah kedua ('OWB') telah membekal dan menghantar kuantiti lebih kurang 2,468.501 matrik tan bunker ('bunker tersebut') kepada kapal defendan ('kapal tersebut') dan sebelum luput tempoh 30 hari bayaran kredit di bawah kontrak bekalan OWB, defendan telah menerima notis lien yang menyatakan bahawa plaintif adalah pemilik bunker tersebut. Berikutan itu plaintif telah memulakan tindakan ini dan memperoleh waran tangkap dan telah menahan kapal tersebut di Port Klang. Plaintif kemudian telah memfailkan permohonan melalui lampiran 45 untuk meminda kenyataan tuntutan bagi memasukkan fasal L4 terma dan syarat Kumpulan OWB, yang bermaksud bahawa kedua-dua defendan dan OWB terikat oleh terma dan syarat am plaintif untuk bekalan bunker tersebut. Defendan dalam menjawab telah memfailkan lampiran 24 untuk membatalkan writ in rem plaintif dan kenyataan tuntutan seperti dipinda. Sementara menunggu perbicaraan lampiran 24, pencelah telah memulakan guaman berasingan ('Guaman ING') terhadap defendan di mana dalam guaman itu, kapal defendan telah ditahan sebagai jaminan tuntutan pencelah untuk harga belian bunker tersebut. Dalam Guaman ING itu, mahkamah juga memberikan penghakiman terus menyebelahi pencelah untuk harga belian penuh bunker tersebut. Berkenaan lampiran 45, isu-isu untuk ditentukan adalah sama ada permohonan itu adalah bona fide; dan sama ada pindaan tidak akan berkuat kuasa menukar guaman tersebut dari satu sifat kepada guaman yang lain dan sifat yang tidak konsisten. Berhubung lampiran 24, isu-isu untuk pertimbangan adalah: (a) sama ada terdapat hubungan agensi antara OWB dan defendan; (b) sama ada terdapat apa-apa tuntutan sah berasaskan penukatan; (c) sama ada tuntutan untuk pengayaan tidak adil berkekalan; dan (d) sama ada terdapat apa-apa kontrak langsung antara plaintif dan defendan.

Diputuskan, menolak lampiran 45 dengan kos; dan membenarkan lampiran 24 dengan kos:

(1) Pengenalan kausa tindakan yang baru merupakan satu anjakan besar itu di mana kapal itu pada mulanya ditahan, berdasarkan struktur fakta yang sama sekali berbeza. Oleh itu, lampiran 45 tidak sah, sebagai asas menggunakan bidang kuasa admiralti yang berbeza dengan tuntutan ini oleh plaintif. Tambahan itu, ia adalah satu manuver taktikal daripada keputusan mahkamah terdahulu untuk penghakiman terus dalam guaman ING. Penambahan kenyataan itu bermaksud untuk mewujudkan hubungan kontrak langsung antara plaintif dan defendan dan lien kontraktual ke atas bunker tersebut. Ini jelas tidak berasas di mana kapal itu telah ditahan dan tidak merupakan asas urusan pihak-pihak pada masa matan pada bulan Oktober 2014 (lihat perenggan 29(f) & 37–38).

(2) Berdasarkan afidavit, tidak terdapat keterangan bahawa defendan dan OWB telahpun bersetuju melalui perjanjian bertulis atau melalui perlakuan yang OWB telah mengkontrak bagi pihak defendan apabila OWB memasuki kontrak dengan plaintif (lihat perenggan 47).

(3) Dalam keadaan itu, plaintif telah mengetahui dan menerima bahawa OWB bukan pengguna akhir tetapi seorang peniaga, yang ia boleh berkontrak dengan pemilik kapal tersebut di mana bunker tersebut akan dihantar, dan bahawa kontrak dengan pemilik itu akan memberi kuasa kepada mereka, secara nyata atau secara tersirat yang perlu, untuk mengambil bunker tersebut dengan segera. Oleh itu, defendan tidak bertanggungjawab untuk penukaran kerana plaintif telah bersetuju degan penggunaan bunker tersebut oleh kapal itu. Tambahan, oleh kerana mahkamah dalam Guaman ING telah memutuskan bahawa plaintif tiada hak kepada bunker tersebut, plaintif tidak boleh menuntut untuk penukaran. Tuntutan plaintif untuk penukaran dengan itu tidak boleh dikekalkan secara faktual dan sah (lihat perenggan 54).

(4) Plaintif telah membekalkan bunker tersebut kepada kapal-kapal menurut kontraknya dengan OWB dan tidak mempunyai kontrak dengan defendan. Ini bermaksud bahawa plaintif hanya patut melihat kepada OWB untuk bayaran di bawah tawaran kontraktualnya, bukan defendan. Selanjutnya, jika tuntutan pengayaan tidak adil dibenarkan, hasil bersih adalah bahawa defendan dengan berkesan akan didedahkan kepada liabiliti berganda kerana defendan telahpun diperintahkanuntuk membayar harga bunker tersebut yang sama kepada pencelah dalam Guaman ING. Atas premis itu, tiada merit dalam tuntutan untuk pengayaan tidak adil (lihat perenggan 61–63).

(5) Dalam kes ini, tiada apa-apa menunjukkan bahawa defendan telah bersetuju untuk terikat dengan terma plaintif apabila defendan

memasuki kontrak secara langsung untuk bekalan bunker tersebut dengan OWB. Defendan juga tidak bersetuju atau membenarkan OWB untuk terikat oleh terma plaintif apabila OWB memasuki perjanjian dengan plaintif untuk bekalan bunker tersebut yang sama. Selanjutnya, plaintif bukan pihak kepada kontrak OWB-defendan begitu juga dengan defendan yang bukan pihak kepada kontrak plaintif-OWB. Plaintif dengan itu dihalang oleh doktrin priviti kontrak daripada menguatkuasakan atau bergantung kepada peruntukan-peruntukan kontrak OWB-defendan (lihat perenggan 66 & 70).

(6) Berhubung lien kontraktual, oleh kerana tiada kontrak secara langsung antara plaintif dan defendan, lien kontraktual tidak timbul. Berhubung lien maritime, plaintif mengakui bahawa tiada lien maritime in rem yang tersedia kepada pembekal bunker sama ada dalam undang-undang Inggeris atau Malaysia, oleh itu, plaintif diestopkan daripada membuat pendapat yang bertentangan (lihat perenggan 72 & 74–75).]

Notes

For cases on statement of claim, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7224–7274.

Cases referred to

'Bunga Melati 5', The [2012] SGCA 46, CA (refd)

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [2011] 5 MLJ 820, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Canpotex Shipping Services Ltd & Ors v Marine Petrobulk & Ors 2015 FC 1108, FC (refd)

Freeman & Lockyear (a firm) v Buckhurst Park Properties (Mangal) Ltd and another [1964] 2 QB 480, CA (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348, HC (refd)

K Rajashekar a/l Kanapathy & Ors v Palm Court Condominium & Ors [2014] 9 MLJ 297, HC (refd)

Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor [2011] 2 MLJ 59, HC (refd)

Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters [2015] 4 SLR 1229, HC (refd)

PST Energy 7 Shipping LLC and another v OW Bunker Malta LTD and another [2015] EWCA Civ 1058, CA (refd)

PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another; 'Res Cogitans' [2015] EWHC 2022 (Comm), QBD (refd)

Scruttons Ltd v Midland Silicones Ltd [1962] AC 446, HL (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)
Lee Wong Yu & Ors v The Owner Of The Ship Or Vessel, 'MV Hua Hong Dua' [1996] MLJU 453; [1999] 6 CLJ 197, HC (refd)

Legislation referred to

Rules of Court 2012 O 14 r 1, O 27 r 3, O 70 r 33

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Azizah Nawawi J:

INTRODUCTION

[1] There are two applications before this court:

(a) encl (45) is the plaintiff's application to amend the Statement of claim; and

(b) encl (24) is the defendant's application to set aside the writ in rem and warrant of arrest dated 12 February 2015 against the vessel and alternatively, to strike out the writ in rem and the statement of claim, as amended, together with damages and/or expenses incurred.

[2] After hearing the parties, this court had dismissed encl (45) and allowed encl (24). The plaintiff's appeal is against both decisions in respect of encls (45) and (24).

THE SALIENT FACTS

[3] The facts, derived from the written submissions of the parties shows that the defendant Malik Al Ashtar Ltd, was the registered and beneficial owners of the ship or vessel known as 'Malik Al Ashtar' (IMO No 9525900) of the port of Malta ('vessel'). United Arab Shipping Co ('UASC') was the registered ship manager of the defendant's vessel at the material time.

[4] The second interveners — OW Bunkers Middle East DMCC ('OWB') was registered with the Dubai Multi Commodities Centre free zone, United Arab Emirates (UAE) since 2007. OWB carried on its main business as wholesalers of petroleum products including supply of marine fuel oil or bunkers to vessels calling at UAE ports.

[5] OWB had been in contractual relationship with defendant/UASC for numerous purchases and supplies of marine fuel oil to vessels managed by UASC including the defendant's vessel at UAE ports. The defendant has made previous purchases from OWB and the defendant has only paid OWB for bunkers purchased and delivered to the vessel.

[6] As part of the purchase transactions for the bunkers, on or about 9 October 2014, the defendant/UASC placed an order with OWB for the purchase and delivery of about 2500 metric tonnes of bunkers to be delivered to the defendant's vessel 'Malik Al Ashtar' on 14 October 2014 at the port of Khor Fakkan, UAE, at the agreed price USD1,310,774.03.

[7] On or about 15 October 2014, a bunker barge arranged by OWB known as 'MT NILE', delivered a quantity of about 2,468.501 metric tonnes of bunkers ('the subject bunkers') to the defendant's vessel. The chief engineer of the defendant's vessel confirmed receipt of the bunkers on the vessel by endorsing a bunker delivery note receipt No 9157 issued by one VTTI Fujairah Bunkering UAE.

[8] As in previous transactions, OWB has agreed that the defendant is to make payment 'within 30 days from the date of delivery upon presentation of Invoice', which is the normal arrangement between the parties.

[9] Upon completion of the delivery of the subject bunkers, OWB then issued an Invoice No 129–19378 dated 15 October 2014 in the sum of USD1,310,774.03 directly addressed to the defendant/UASC. The payment under the invoice is to be made only to OWB. OWB's invoice No 129–19378 contained a 30 days payment term with a due date on 14 November 2014. In default, interest was to accrue on the outstanding sum in accordance with OWB's general terms and conditions of sale.

[10] On 7 November 2014 (ie before the expiry of 30 days credit payment term under OWB supply contract), the defendant received a notice of lien dated 7 November 2014 for the same subject bunkers delivered on the defendant's vessel, from the plaintiff's London solicitors' Reed Smith.

[11] Vide the plaintiff's notice of lien, the defendant was informed for the first time about a OWB's purchase order No 200–10528 dated 9 October 2014 ('PO') and sales confirmation note No 557614 ('SCN') dated 9 October 2014 issued by the plaintiff to OWB. Under this OWB's PO and the plaintiff's SCN, it was stated that the plaintiff (as seller) had sold and delivered a quantity of

about 2,468.501 metric tones of marine fuel oil/bunkers to OWB (as buyer) on a agreed price of USD528.00 per mt totalling USD1,303,368.53.

[12] It was also contended by the plaintiff that as the physical supplier of the subject bunkers, they were the owners of the subject bunkers delivered to the defendant's vessel on 15 October 2014 vide bunker barge 'MT Nile' based on the bunker delivery note receipt No 9157 ('BDN Receipt'), bunkers stock certificate of quantity and time sheet prepared by master of barge MT Nile.

[13] The plaintiff's notice of lien stipulated that since the plaintiff had exercised a lien over the subject bunkers, therefore, the defendant should not pay OWB. The lien notice further states that if the plaintiff's notice was disregarded, the *defendant may end up paying twice for the bunkers* ie once to OWB and again to the plaintiff. The plaintiff also demanded that the defendant provided security in the sum of USD1,500,000, in default of payment to them.

[14] The plaintiff, vide its London solicitors' email dated 12 November 2014 to the defendant's London solicitors, further demanded that payment of USD1,303,368.53 allegedly owed by OWB to the plaintiff, to be settled by the defendant to the plaintiff.

[15] At or about the same time, defendant/UASC received separate letters from OWB's group's chargee bank ING Bank NV Netherlands ('ING Bank') ('the first intervener') dated 7 November 2014, 12 November 2014 and 13 November 2014 giving notice to the defendant/UASC that all of OWB's rights in respect of supply contract and any payment due under the said OWB's Invoice No 129–19378 dated 15 October 2014 in the sum of USD1,310,774.03 was assigned by way of security to the first intervener. The assignment was pursuant to an english omnibus security agreement dated 19 December 2013 between OW Bunker & Trading A/S and ING Bank.

[16] There were negotiations in London to set up an escrow account and the total sum of USD1,303,368.53 was to be held by a stakeholder to secure the plaintiff's and OWB's competing claims pending determination.

[17] Despite the imminent setting up of escrow account for the competing claims in London, the plaintiff commenced this action in the Malaysian court against the defendant's vessel and obtained a warrant of arrest on 12 February 2015 on ex parte basis and arrested the vessel at Port Klang, Selangor on 16 February 2015.

[18] In order to secure the release of its vessel, defendant had to make payment into court in the sum of RM6,492,126.70 (USD1,803,368.53) to secure the release of the vessel in the intervener's action.

[19] The defendant then took out this application in encl (24) to set aside/strike out the plaintiff's writ in rem and warrant of arrest. The application is on the basis that the plaintiff has wrongly brought its claim in rem against the defendant for the price of the subject bunkers when the defendant has no contractual nexus with the plaintiff on the purchase and supply of the subject bunkers.

[20] Whilst the hearing of the defendant's application in encl (24) was pending, the interveners (ING Bank and OWB) commenced a separate admiralty in rem action in the Kuala Lumpur High Court No 27NCC-37–06 of 2015 ('the ING Suit') and arrested the defendant's vessel on 21 June 2015, also as a security for the interveners' claim for the purchase price of the same subject bunkers supplied to the defendant's vessel 'Malik Al Ashtar' on 15 October 2014 at the port of Khor Fakkan, UAE via bunker barge 'MT Nile'.

[21] The defendant's vessel was subsequently released on 24 June 2015, only upon provision of fresh alternative security by the defendant for the Interveners' claim in the ING Suit by way of payment into court in the sum of RM7,331,481.80 (USD1,936,164.85) in accordance with an order pursuant to an agreement between solicitors under O 70 r 33 of the Rules of Court 2012.

[22] On 29 July 2015, the interveners (ING Bank and OWB) were granted leave to intervene in this action.

[23] On 12 November 2015, the interveners (ING Bank and OWB) applied for summary judgment pursuant to O 14 r 1 and O 27 r 3 of the Rules of Court 2012, in the ING Suit. The plaintiff (Vitol) was granted leave to intervene in ING Suit.

[24] After hearing the application, on 12 November 2015 this court has granted summary judgment in the ING Suit favour of the interveners (ING Bank and OWB) against the defendant for the full purchase price in respect of the same subject bunkers supplied to the defendant's vessel together with interest and costs.

THE FINDINGS OF THE COURT

Enclosure (45)

[25] Enclosure (45) is the plaintiff's application to amend the statement of claim to include, amongst others, cl L4 of the OWB Group Terms and Conditions, which would mean that both the defendant and OWB are bound by Vitol's (plaintiff) general terms and conditions for the supply of the subject bunkers. The proposed amendments seek to include Vitol's claims in contact and under the lien clause. Thus, the plaintiff seeks a declaration that it has the lawful ownership and title to the subject bunkers and is therefore entitled to the cost of the subject bunkers.

[26] The principles on amendment has been set out in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, which encompass the following questions in order to ascertain whether injustice would or would not result:

(a) whether the application is bona fide;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

Whether the application is bona fide

[27] Both the defendant and the interveners take the common position that the proposed amendment is a tactical manoeuvre to avoid having the plaintiff's case struck out and/or set aside and is therefore not a bona fide amendment.

[28] In *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348, it was held at p 351 as follows:

> ... However, in the present application, one has to view the question of delay in the light of the following factors. First, can the plaintiffs succeed in their claim against the second defendant on the original pleading? In all probability, they cannot. They would have faced the same problem and obstacle as the respondent in *Hajah Rajiah* [1987] 2 CLJ 154 *had the second defendant's application under O 18 r 19 been heard within a reasonable period after the said application was filed and before the present application. Secondly, their delay in filing this application must have something to do with the outcome of the decision in Hajah Rajiah* [1987] 2 CLJ 154. *Hence, this application for amendment was made to avoid the original writ and the statement of claim from being struck out. It is this situation that Stocker LJ called a 'tactical manoeuvre'*. (Emphasis added.)

[29] Having considered the submission of the parties, I agree with both the defendant and the interveners that encl (45) is a tactical manoeuvre and was not made bona fide. This is based on the following reasons:

(a) the crux of the defendant's position was that there was no contractual relationship between the plaintiff and the defendant;

(b) that the relevant contract for the subject bunkers was at all times between the defendant and OWB;

(c) that this court has granted summary judgment in favour of the interveners (ING Bank and OWB) on 12 November 2015 in the ING Suit despite arguments by the defendant and the plaintiff (as the interveners in the ING Suit) that OWB did not have title to the bunkers. This court also finds that OWB, which had a direct contractual nexus with the defendant, is entitled for the price and title of the same subject bunkers delivered on the defendant's vessel on 15 October 2014 at UAE;

(d) this court had also determined in the ING Suit that the plaintiff's (as the intervener in the ING Suit) argument on the title to the same subject bunkers is a 'non starter', that the plaintiff's arguments on the issue of title on the bunkers had failed. This court makes the following finding in the ING Suit:

> In any event, even if we are to accept the Defendant's submission on the issue of title, the same has been decided by the English Court of Appeal in the *PST Energy 7* case. So, if the Defendant's case on title falls, it goes without saying that the Intervener's proposed defence on title is a non starter.

(e) thus, the plaintiff, in order to avoid having their statement of claim and writ struck out and/or set aside, given that the title issue has been held to be irrelevant in the ING Suit, sought to take advantage of *Canpotex Shipping Services Ltd & Ors v Marine Petrobulk & Ors* 2015 FC 1108 ('the *Canpotex* case') judgment, two months after it was issued (ie 23 September 2015) and after judgment was granted in the ING Suit in favour of the intervener by filing encl (45) to include completely new causes of action;

(f) the proposed amendments are clearly meant to tailor the claim to fit the judgment in *Canpotex* so as to bring the *Canpotex* case into application, hence the addition of statements meant to establish a direct contractual relationship between the plaintiff and the defendant and a contractual lien over the subject bunkers. This can be seen from the submission of the plaintiff, where it is submitted that the nub of the plaintiff's case for amendment is as follows:

> If the contract between Vitol and OW Bunker incorporated the Vitol Terms and the contract between OW Bunker and the Owners incorporated the OWB terms, then, by the application of *clause 4* of the OWB Terms, the OWB Terms are varied to incorporate and apply the Vitol terms, thereby giving Vitol the right to enforce these terms directly against the Owners. Meaning, Vitol can claim the price of the Bunkers supplied *directly from Owners* under the OWB — Vitol Contract.

> This is the legal reasoning adopted in the recent Canadian Federal Court decision of *Canpotex Shipping Services Ltd and Others v Marine Petrobulk Limited and Others* [2015] FC 1108, where the Judge construed a similar clause L4 appearing in the relevant contract in that case, so as to make the operators of the vessel joint buyers of the bunkers fuel alongside OWB and thus jointly liable with OWB to the physical supplier for the price of the bunkers.

This is clearly not the basis on which the Vessel was arrested and was not the basis of the parties' dealings at the material time in October 2014; and

(g) the plaintiff has also sought the opinion of a Queens Counsel (QC) to support its application, an opinion which consists solely of the supposed strength of a direct contractual claim and the applicability of the *Canpotex* judgment. This demonstrates further the tactical nature of the amendment application. Indeed, Kimbell QC at paras 30 and 31 of his opinion dated 24 November 2015 (see pp 77 and 78 of the exhibits to the amendment affidavit) wrote as follows:

> [30] I note that Vitol has pleaded claim in tort and unjust enrichment. I do not propose to consider these claims in detail because there seems little point in doing so given the strength of Vitol's claims in contact and under the lien clause.

Whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character

[30] It is also common ground that the proposed amendment would not be allowed if the amendments would turn the suit from one character into a suit of another and inconsistent character.

[31] The plaintiff's claim against the defendant, as endorsed in the writ in rem and statement of claim, is for the price of the subject bunkers delivered to the defendant's vessel on 15 October 2014 at UAE. For the purpose of invocation of writ in rem and arrest of the defendant's vessel in this action, the plaintiff took the position that OWB bunker has failed, refused and/or neglected to pay the plaintiff a debt in the sum of USD1,303,368.53 being costs of the subject bunkers pursuant to a contract for supply of bunkers between the plaintiff and OWB, of which the defendant is not privy.

[32] The original pleadings were founded upon grounds of *title, conversion and interference,* and though it had referred to cll 2.1 and 2.2 of Vitol's general terms and conditions, it is clear that the plaintiff had intended to enforce them via an agency relationship. The statement of claim, after referring to cll 2.1 and 2.2, sets out the facts of the delivery and non-payment, before pleading as follows:

A

> 13. It is averred that Vitol was under the reasonable belief that *OW Bunker, who dealt with Vitol, had the actual or apparent authority of Malik to enter into the Agreement* and that Malik had intended to be bound by such Agreement as evidenced, inter alia, by supply of the Bunkers to the Vessel.

B

[33] However, the affidavit to lead warrant of arrest of Rajeev Philip affirmed on 27 January 2015 only alleges a cause of action for *conversion* of the bunkers by the defendant. The plaintiff after setting out cll 2.1 and 2.2 proceeds to lay out the facts of delivery and non-payment before affirming as follows:

C

> 12. I am further advised by my solicitors and verily believe to be true that, without prejudice to all other rights and remedies available to the Defendant, *there is a cause of action against the Defendant for conversion of the Bunkers for their own use.* At all material times, the title and ownership remained with Vitol.

D

[34] Subsequently, vide this application, the plaintiff now seeks to include two substantially new claims of direct contractual claim via cl L4 of the OWB Group terms and conditions, and a contractual lien, and in doing so, proposes additions to suit the facts of *Canpotex* case.

E

[35] These substantial amendments, which seek to make the defendant a party to the Vitol-OWB contract, were proposed in order to establish a direct contractual claim by the plaintiff against the defendant according to the *Canpotex* case. This clearly changes the factual structure and character of the plaintiff's original claim, and should not be allowed.

F

[36] The same position was taken by the court in the case of *K Rajashekar a/l Kanapathy & Ors v Palm Court Condominium & Ors* [2014] 9 MLJ 297 where the plaintiffs sought to amend on the basis that the amendments were a reformulation of the original pleadings in a more comprehensible form. In

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dismissing the application, the court held as follows at para 35:

> *I agree with the 15th defendant that the proposed amendments if allowed, would turn the suit from one character into a suit of another and inconsistent character.* The original claim is for damages for the actions of the JMB in moving the main entrance. By the proposed amendments the plaintiffs seek to have the tenancy agreements declared

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> null and void. Applying the dictum of Mohd Azmi FCJ in Yamaha Motors, this is not permissible. The plaintiffs' claim for damages would be converted into a claim for rescission of the agreements based on a completely different factual structure. (Emphasis added.)

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[37] Similarly, in the present case, the introduction of the new causes of action represents a substantial shift from that upon which the vessel was initially arrested, based upon completely different factual structures.

[38] Therefore, having considered the application to amend the statement of claim, I find that the application is not bona fide, as the basis of invoking the admiralty jurisdiction is different from what they are now asking. Added to that, it is a tactical manoeuvre from my earlier decision for summary judgment in the ING Suit and the plaintiff is now seeking to widen the contractual obligation premised on the Canadian decision in the *Canpotex* case. As such, the application is dismissed with cost in the cause.

[39] However, if I am wrong on this, I will also consider the proposed amendments in considering the defendant's application.

Enclosure (24)

[40] Enclosure (24) is the defendant's application to set aside the writ in rem and warrant of arrest dated 12 February 2015 against the vessel and alternatively, to strike out the writ in rem and the statement of claim, as amended, together with damages and/or expenses incurred.

[41] The law in respect of the striking out and/or setting aside applications has been set out in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where the Federal Court held as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule* (per *Lindley MR in Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted *when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (see *AG of Duchy of Lancaster v L & NW Rly Co 8*) ... (Emphasis added.)

[42] In respect of admiralty cases, the Court of Appeal of Singapore held in the case of *The 'Bunga Melati 5'* [2012] SGCA 46, that there are two ways in which an action could be said to be unsustainable (see para 39 of the judgment):

(a) legally unsustainable: if 'it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks'; or

(b) factually unsustainable: if it is 'possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.

[43] In the present case, the plaintiff's causes of action against the defendant are as follows:

(a) agency — that OWB was contracting on behalf of the defendant when it entered into the contract between OWB and plaintiff dated 14 October 2014 for the sale of the bunkers to OWB ('Vitol-OWB contract');

(b) conversion — that the plaintiff has title over the subject bunkers and that by using the subject bunkers the defendant has converted them;

(c) unjust enrichment — that the defendant is liable to the plaintiff in restitution for unjust enrichment;

(d) direct contract (the *proposed amendment*) — that the plaintiff has a direct contract with the defendant via cl L4 in the contract between OWB and the defendant dated 9 October 2014 ('OWB-Malik contract'); and

(e) lien (the *proposed amendment*) — that the plaintiff has a lien over the subject bunkers.

Issue (i): Whether there is an agency relationship between OWB and the defendant

[44] In para (13) of the statement of claim, the plaintiff's claim on agency is as follows:

> 13. It is averred that Vitol was under a reasonable belief that OW Bunker, had the *actual or apparent authority* of Malik to enter into the Agreement and that Malik had intended to be bound by such Agreement as evidenced, inter alia, by supply of the Bunkers to the Vessel

[45] In *Freeman & Lockyear (a firm) v Buckhurst Park Properties (Mangal) Ltd and another* [1964] 2 QB 480, Lord Diplock defined 'actual authority' as being 'a legal relationship between the principal and agent created by consensus agreement to which they alone are parties'.

[46] On the issue of 'apparent authority', in the case of, *Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor* [2011] 2 MLJ 59, it was held at paras 49 and 50:

> [49] With the above principles in mind, to prevail on their apparent agency argument, the first defendant must establish that the plaintiff created a situation where the first defendant believed Simon Wong had authority to approve product designs; and that the first defendant's belief was reasonable. *For 'apparent authority' to exist, the agent must not purport to make the agreement as principal himself. Therefore the source of the 'apparent authority' has to be the principal, not the agent. If there is no representation by the principal, there can be no apparent authority conferred on the*

agent, even if the agent represents the contrary. It is trite law that an agent cannot ordinarily confer ostensible authority on himself.

[50] The most glaring weakness of the defendants' contention is that they proceed on the basis that Simon Wong, the so-called agent had in fact held out to have apparent authority. *The point to make here is this. The first defendant has not established that the plaintiff had ever made any representation or created a situation, which conferred any authority on Simon to give approval of designs*. (Emphasis added.)

[47] Having considered the affidavits before me, I find that there is no evidence that the defendant and OWB had ever agreed by written agreement or by conduct that OWB was contracting on behalf of the defendant when OWB entered into the Vitol-OWB contract. In particular, there was no document conferring actual authority upon OWB to contract on behalf of the defendant. Neither was there any representation by the defendant that OWB had actual or apparent authority to enter into any agreements on its behalf.

[48] Indeed, this has been strongly refuted by the defendant in its affidavit. In Jorn Hinge affidavit 1, the defendant stated as follows at para 30:

Further, at no time did the Defendant expressly or impliedly or by conduct represented to the Plaintiff that OWB had any actual or apparent authority of the Defendant to enter into any agreement or contract or that the Defendant is to be bound by any such agreements or contracts directly or otherwise with the Plaintiff for the supply of the bunkers to the Defendant's vessel at the port of Khor Fakkan, UAE.'

[49] Added to that, it is clear that OWB had been contracting for its own benefit, as can be seen from the following evidence:

(a) that there were separate back-to-back sale and purchase agreements — one between the plaintiff and OWB, and another one between the defendant and OWB;

(b) that the Vitol-OWB contract and the OWB-Malik contract had different purchase prices wherein there was a mark-up for OWB's profit;

(c) that there were clauses in the OWB-Malik contract entitling OWB to take legal action on the non-payment and/or other contractual breaches by the defendant; and

(d) that the OWB-Malik contract did not make any reference to the plaintiff or the plaintiff's rights.

Issue (ii): Whether there is any valid claim premised on conversion

[50] In paras 14 and 15 of the statement of claim, the plaintiff's claim, premised on the tort of conversion is as follows:

A

> 14. Further or alternatively, since OW Bunkers or Malik have to date not been paid for the Bunkers, by virtue of Clause 11.2 of the Vitol General Terms and Conditions, title and ownership in the Bunker at all material time and still remain with Vitol.

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> 15. Therefore, Malik has wilfully and intentionally interfered with the Bunkers and converted the Bunkers for their own use, thereby depriving Vitol from the use and possession of the Bunkers. Malik are accordingly liable to pay Vitol damages up to the full value of the Bunkers ...

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[51] The plaintiff seeks to rely upon cl 11.2 of the Vitol general terms and conditions to impose a contractual lien over the bunkers. Clause 11.4 states as follows:

D

> Title to the Marine Fuels shall pass to the Buyer upon payment of the value of the Marine fuels delivered, pursuant to clause 14. Marine Fuels are supplied under Seller's Terms on the faith and credit of the vessel to which they are supplied as well as the faith and credit of the Buyer. Until full payment has been made, the Seller shall have a lien over the Vessel for the value of the Marine fuels delivered. If the Marine Fuels have been commingled with other Marine Fuels on board the Vessel, the Seller shall have the right of lien and have title over such part of the commingled Marine Fuels as corresponds to the value of the quantity of the Marine Fuels delivered.

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[52] The conversion argument was raised in the case of *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another; 'Res Cogitans'* [2015] EWHC 2022 (Comm) (confirmed on appeal in [2015] EWCA Civ 1058) involving a clause similar to that of cl 11.2 above, which is worded as follows (see para 16 of the judgment):

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> Title to the Marine Fuels shall pass to the Buyer upon payment for the value of the Marine Fuels delivered, pursuant to the terms of Clause 8 hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agrees that they are in possession of the Marine Fuels solely as Bailee for the Seller. If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to the Marine Fuels shall remain with the Seller corresponding to the quantity of the Marine Fuels delivered. The above is without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.

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[53] Males J held that, despite the presence of such a clause, the owners were not liable to the physical supplier for the tort of conversion as they had consented to the use of the bunkers by the vessel. The physical suppliers knew that the bunkers were for consumption by the vessel. He stated as follows at para 50:

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> [50] *It is clear in my judgment that, at least so far as English law is concerned, Rosneft (and so far as relevant RN-Bunker)[the supplier] did give such permission. Rosneft knew*

and accepted that OWBAS was not an end user but a trader, that it would contract, either directly or indirectly, with the owner of the vessel to which the bunkers would be delivered, and that the contract with the Owners would authorise them, expressly or by necessary implication, to consume the bunkers immediately. In such circumstances the Owners can be under no liability to Rosneft in the tort of conversion because Rosneft knew and agreed that the Owners would consume the bunkers before they were paid for in accordance with the relevant credit terms. The vessel's consumption of the bunkers was not a wrongful act by the Owners but an act carried out with the permission of the owner of the bunkers being consumed, namely Rosneft. The Fesco Angara [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep 61 is an authority directly in point.

[51] This can be analysed either on the basis that Rosneft is bound by the permission in clause H.2 of the OWB terms because a head bailor is bound by the terms in a contract between his bailee and a sub-bailee if he has expressly or impliedly consented to those terms (see cases such as *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716) or on the simpler basis that by delivering the bunkers to the vessel (or causing them to be delivered) knowing that they would or might be consumed straight away Rosneft gave permission to the Owners for that to happen and was content to look exclusively to OWBAS as its contractual counterparty for payment. This contractual structure is in my judgment perfectly workable and is the clear result of what the various parties concerned have agreed.

[52] Accordingly there is no breach by OWBM of its contract with the Owners.

[53] As already indicated, I cannot exclude the possibility that the Owners may have a liability to Rosneft under some system of law other than English law and, if so, that the vessel may be exposed to arrest in some jurisdictions. However, in circumstances where the bunkers were delivered on board the vessel pursuant to an English law contract between Rosneft and OWBAS which by necessary implication authorised the consumption of the bunkers prior to payment, and which contemplated another English law contract between OWBM and Owners which expressly authorised such consumption, I see no reason why the possibility of such a claim should affect the decision in this case. Exposure to claims with the possibility of arrests is one of the risks which shipowners run. (Emphasis added.)

[54] Similarly, in the present case, the plaintiff had known and accepted that OWB was not an end user but a trader, that it would contract with the owner of the vessel to which the bunkers would be delivered, and that the contract with the Owners would authorise them, expressly or by necessary implication, to consume the bunkers immediately. This is demonstrated by the undeniable fact that the plaintiff had itself agreed to deliver the contracted bunkers to the vessel with a 30 day period of credit, by which time the subject bunkers would have been consumed. As such, the defendant is not liable to the plaintiff, as the physical supplier for the tort of conversion as the plaintiff had consented to the use of the subject bunkers by the vessel.

[55] The same position was taken in the case *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other*

matters [2015] 4 SLR 1229, where Steven Chong J considered the arguments on the physical bunkers supplier's cause of action in a tort of conversion claim:

> (2) The tort of conversion argument
>
> [41] The 'tort of conversion argument' is similarly premised on the physical suppliers having title to the bunkers. The argument is that the purchasers, in consuming the bunkers, have interfered with the physical suppliers' possessory rights and are therefore liable in the tort of conversion. *I do not agree*.
>
> [42] *A claim in conversion lies where there has been an unauthorized dealing with a chattel in a manner which deprives the claimant of the use and the possession of the same* (see Clerk & Lindsell on Torts (Michael Jones, gen ed) (Sweet & Maxwell, 21st Ed, 2014) ('Clerk & Lindsell') at para 17-07). It necessarily follows, therefore, that acts which are performed within the scope of the actual owner's permission cannot attract liability in the tort of conversion (see Clerk & Lindsell at para 17-08). *In the present case, the physical suppliers delivered the bunkers to the vessels and must plainly have intended (or at least must be taken to have intended) for the bunkers to be consumed. This is consistent with cl H.2 of the OW entities' GTCs which permitted the bunkers to be used in the propulsion of the vessel even before payment. This being the case, it is clear that no claim in conversion may lie.*
>
> [43] In any event, *any claim in conversion, even if it does exist, will lie only in damages. It does not follow that the physical suppliers have a legitimate claim to the contractual price* of the bunkers under the Purchaser–Seller contract. (Emphasis added.)

[56] Added to that, this court in granting summary judgment in the ING Suit in favour of the interveners (ING Bank and OWB) has made a finding that there exists a direct contractual nexus between the OWB and the defendant and that the plaintiff has no claim in respect of the 'title' to the same subject bunkers delivered to the defendant's vessel. If the plaintiff has no title to the subject bunkers, then the plaintiff cannot claim for conversion.

[57] In the premises, I agree with the defendant and the interveners that the plaintiff's claim in the tort of conversion is both legally and factually unsustainable.

Issue (iii): Whether the claim in unjust enrichment is sustainable

[58] In para 16 of the plaintiff's statement of claim, the plaintiff's claim in unjust enrichment is as follows:

> 16. In the alternative, Vitol had supplied for the Cost of the Bunkers to the Vessel lawfully with the legitimate expectation of payment for the Cost of the Bunkers. As Malik has accepted delivery of the Bunkers and enjoyed the benefit of use of the same, it is tantamount to an unjust enrichment. Vitol will prove the elements of unjust enrichment according to law, at trial

[59] Similar argument on the issue of unjust enrichment was also considered by Steven Chong J in *Precious Shipping Public Co Ltd*, where His Lordship said this in paras (46) and (47):

> (4) The unjust enrichment argument
>
> 46 In order for a claim in unjust enrichment to succeed, a plaintiff has to show:
>
> (a) the defendant has received a benefit (ie he has been enriched);
>
> (b) the enrichment is at the plaintiff's expense;
>
> (c) it is unjust to allow the defendant to retain the enrichment; and
>
> (d) there are no defences available to the defendant (see Skandinaviska Enskilda Banken AB (Publ), *Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [110]). Citing this passage, Mr Ibrahim submitted:
>
> On the facts of the present case, the [purchaser] has a legal compulsion (being the unjust factor) to return the [contractual price of the bunkers] to the [physical supplier] and it would be manifestly unjust if the [purchaser] does not do so. ... Justice demand therefore demands [sic] that this Honourable Court should allows [sic] the [physical supplier's] claim by reversing the windfall obtained by the [purchaser], which in turn ensures certainty in the Bunker trade. [emphasis added].
>
> 47 This argument is plainly question-begging. What Mr Ibrahim seems to be saying is that the purchaser is legally liable to make restitution of the contractual price of the bunkers because it would be unjust of the purchaser not to when he is legally obliged to do so. This argument makes little sense. If the purchaser were legally obliged to pay the physical supplier, then there would be no need to appeal to the doctrine of unjust enrichment — the obligation to pay would stem from the primary obligation, be it in contract or otherwise. However, *the question of whether the purchaser has a legal obligation to pay the contractual price of the bunkers to the physical supplier is precisely the question which is in dispute.* In any case, the *argument is simply factually unsustainable.* The purchasers have admitted that they are liable to make payment for the bunkers so there is no question of them withholding payment and thereby being unjustly enriched. *The only question is to whom they should make payment.* (Emphasis added.)

[60] From the factual matrix of this case, the plaintiff's sales order confirmation and tax invoice is clear evidence that the plaintiff had the intention to contract directly with OWB only, and had indeed contracted for the supply of the subject bunkers between themselves and not the defendant.

[61] The plaintiff, therefore, had supplied the subject bunkers to the vessels pursuant to its contract with OWB. The plaintiff has no contract with the defendant. This means that the plaintiff should only look to OWB for payment under its contractual bargain, not the defendant.

[62] Further, if the claim in unjust enrichment is allowed in this case, and the defendant is liable to pay the plaintiff for the same subject bunkers, and the net result is that the defendant would effectively be exposed to double liability as the defendant has already been ordered to pay for the price of the same subject bunkers to the interveners in the ING Suit.

[63] In the premise, there is no merit in the claim in unjust enrichment.

Issue (iv): Whether there was any direct contract between the plaintiff and the defendant (the proposed amendment)

[64] With regards to the proposed amendment on a contractual relationship between the plaintiff and the defendant, the plaintiff relies entirely upon cl L4 of the OWB group terms and conditions to claim that the defendant are jointly liable with OWB to pay for the bunkers, premised on the *Canpotex* case. Premised on the *Canpotex* case, it is the submission of the plaintiff that the terms of the contract are varied and that the defendant shall be deemed to have read and accepted the terms and conditions imposed by the plaintiff.

[65] Clause L4(a) states as follows:

> These Terms and Conditions are subject to *variation* in circumstances where the physical supply of the Bunkers is being undertaken by a third party *which insists that the Buyer is also bound by its own terms and conditions*. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyers shall be deemed to have read and accepted the terms and conditions imposed by the said third party. (Emphasis added.)

[66] In the present case, there is nothing to show that the defendant has agreed to be bound by the plaintiff's terms when the defendant entered into a direct contract for supply of the subject bunkers with OWB. Nor did the defendant agree or authorise OWB to be bound by the plaintiff's terms when OWB enters into an agreement with the plaintiff for the supply of the same subject bunkers. At all material times, it is not in dispute that the defendant was not aware of any contract for sale of the same subject bunkers between the plaintiff and OWB which incorporated the plaintiff's terms.

[67] I also agree with learned counsel for the interveners that the *Canpotex* case involved a different set of terms and conditions. In particular, the words 'which insists that the Buyer is also bound by its own terms and conditions' *do not appear* in the clause before the judge in *Canpotex*. The clause concerned in *Canpotex* reads as follows (see para 120):

> Schedule 3, Term L.4 provides that terms and conditions of the Contract are subject to variation in circumstances where the physical supply of the fuel is being

undertaken by a third party. In said circumstances, the terms of the Contract are varied and the buyer shall be deemed to have read and accepted the terms and conditions imposed by the third party seller.

[68] In any event, the *Canpotex* case is Canadian in origin and has not been addressed or accepted by the English courts. It does not therefore reflect the English position on the matter, and neither is it binding on the Malaysian courts. In addition, the *Canpotex* case is being appealed, and is therefore not final.

[69] Added to that, with regards to cl L4(a) itself, I also find that there is no document or evidence which indicates that there was any insistence by the plaintiff that the defendant be bound by the Vitol general terms and conditions at the time the OWB-Malik contract was entered into.

[70] Further, the plaintiff was never a party to OWB-Malik contract, and neither was the defendant a party to the Vitol-OWB contract. The plaintiff is therefore barred by the doctrine of privity of contract from enforcing or relying upon the provisions of the OWB-Malik contract. In *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [2011] 5 MLJ 820, the Court of Appeal, in restating the position under English law in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, held as follows:

[101] The above being the position, we are of the view that consequently, the plaintiff's direct claim against Bacom would suffer the same fate on the doctrine of privity. Bacom is clearly not a party to the development agreement. In this respect, we would unhesitatingly agree with the submission of learned counsel for Bacom that Bacom has agreed with the first to the fifth defendants that it is bound by the terms of the development agreement is a matter between the two parties and cannot confer contractual privity between the plaintiff and Bacom. *The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472–473):

> In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the *general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him*. That rule appears to have been crystallised a century ago in *Tweddle v Atkinson* ((1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* ([1915] AC 847).

[102] In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; [1967] 1 LNS 67 , the Privy Council held that the doctrine of privity applies in Malaysia. In

delivering the judgment of the Board, Lord Wilberforce said (at p 174):

> It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. *On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue*. (Emphasis added).

Issue (v): Whether there is any lien over the vessel or bunker by the plaintiff (the proposed amendment)

[71] The lien claim by the plaintiff is set out in para 15A of the proposed amended statement of claim:

> Plaintiff had the right to exercise a lien over the Bunkers under contract in accordance with clause 11.2 of Vitol General Terms & Conditions. Consequently [the Defendant] was liable to pay the price Vitol agreed with [OWB].

[72] However, since is no direct contract between the plaintiff and the defendant, a contractual lien does not arise. In any event, a lien gives no right to payment; only a right to retain possession of bunker until the debt is paid by OWB. The plaintiff has no lien over, or right to, the debt payable by the defendant to OWB.

[73] In respect of maritime lien, in the case of *Lee Wong Yu & Ors v The Owner Of The Ship Or Vessel, 'MV Hua Hong Dua'* [1996] MLJU 453; [1999] 6 CLJ 197, Hassan Lah JC (as His Lordship then was) stated as follows:

> The maritime lien is a concept peculiar to maritime law. As regards certain maritime claims the ship or other property in respect of which the claim arises is charged with that claim, the maritime lien being that 'charge', so that the maritime lien can be enforced by an action in rem in whosoever's hands the property may be. The classic definition of a maritime lien was provided by Sir John Jervis in The 'Bold Buccleugh' where he said:
>
> > Having its origin in the rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process and Mr. Justice Story explains that process to be a proceeding in rem and adds, that wherever a lien of claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it ... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.

There are numerous other judicial definitions in similar terms.

The claims which give rise to maritime liens

Only a limited class of *maritime liens* are recognised in English law. In The 'Bold Buccleugh' four categories were listed:

(i) *damage done by a ship;*

(ii) *salvage;*

(iii) *seamen's wages;*

(iv) *bottomry and respondentia.*

To these must be added a fifth, statutory category:

(v) *Master's wages and disbursements.*

(Emphasis added.)

[74] Therefore, applying the above case I am of the considered opinion that there is no maritime lien in rem available to the supplier of bunkers in either English or Malaysian law. In fact, the plaintiff has conceded such position, as can be seen from para (47) of the affidavit affirmed by Rajeev Philip 15 April 2015:

47. Paragraph 33 is admitted. I am advised by Vitol's solicitors that Hr. Hinge is correct when he says that *a claim arising from the supply of necessaries does not give rise to a maritime lien. This is a well known and established principle of admiralty law and practice. Vitol has never suggested otherwise.* Claims under sections 20(2)(m) and 21(4) SCA give rise to statutory in rem claims not maritime lien in rem claims. (Emphasis added.)

[75] Therefore, having taken the above position, the plaintiff is estopped from taking a contrary view. Hence, the plaintiff's contention now that it has a claim in the nature of maritime lien is clearly misconceived.

CONCLUSION

[76] Premised on the reasons enumerated above, I will allow the defendant's application to strike out the plaintiff's writ and statement of claim with cost. In view of such finding, I will not deal with the alternative prayer to set aside the writ and warrant of arrest.

[77] Lastly, I would like to express my sincere appreciation to all learned counsel for their well researched submissions to enable me to decide on this case.

Enclosure 45 dismissed with costs; encl 24 allowed with costs.

Reported by Dzulqarnain Ab Fatar